

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH MITCHELL,
Petitioner,

No. C 07-4619 SI (pr)

ORDER OF DISMISSAL

v.

U. S. ATTORNEY GENERAL
ALBERTO GONZALES,
Respondent.

Joseph Mitchell filed a petition for writ of habeas corpus to compel his removal by the U.S. immigration authority formerly known as the Immigration & Naturalization Service and now known as the Bureau of Immigration and Customs Enforcement.

The petition has an incurable flaw: Mitchell cannot meet the custody requirement. Federal jurisdiction over a petition for a writ of habeas corpus exists only for petitions filed by persons "in custody" at the time the petition is filed. See 28 U.S.C. § 2241(c); Carafas v. LaVallee, 391 U.S. 234, 238 (1968). "[T]he bare detainer letter alone does not sufficiently place an alien in INS custody to make habeas corpus available." Campos v. INS, 62 F.3d 311, 314 (9th Cir. 1995) (quoting Garcia v. Taylor, 40 F.3d 299, 303 (9th Cir. 1994)). The petitioner has to be in custody for the action he seeks to challenge in his habeas petition.

Mitchell is in custody serving a 15-to-life sentence on a murder conviction and is not in custody under the authority of the immigration authority. Mitchell indicates that there is an immigration detainer for him but it has not been "activated." Petition, p. 1. Because Mitchell is not in the immigration authority's custody, his petition challenging the immigration authority's

1 action or inaction must be dismissed for lack of jurisdiction. Mitchell someday may be in the
2 custody of the immigration authority, but he must wait until that time to challenge the
3 immigration authority's action or inaction.

4 Mitchell's in forma pauperis application is DENIED because he has the funds to pay the
5 filing fee. (Docket # 2.) Mitchell must pay the \$5.00 filing fee for this action no later than
6 **November 1, 2007.**

7 This action is dismissed for lack of jurisdiction. The clerk shall close the file.

8 IT IS SO ORDERED.

9 DATED: September 12, 2007



SUSAN ILLSTON
United States District Judge